

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 Susie Leahy, individually and Susie Leahy as)
4 guardian ad litem for Rebecca Susan Leahy, a)
5 minor, Hannah Joy Leahy, a minor, and)
6 William John Leahy, III, a minor,)

Case No.: 2:10-cv-00082-GMN-PAL

ORDER

7 Plaintiffs,)

8 vs.)

9 Lone Mountain Aviation, Inc., a corporation,)

10 Defendant.)

11 This is a diversity action filed against Defendant Lone Mountain Aviation, Inc. ("Lone
12 Mountain") by the sole surviving heirs of decedent William John Leahy, Jr. – Susie Leahy,
13 individually, and as guardian ad litem for Plaintiffs Rebecca Susan Leahy, Hannah Joy Leahy,
14 and William John Leahy, III, who are minors (collectively, "Plaintiffs"). Before the Court are
15 eleven Motions in Limine (ECF Nos. 68-78) filed by the parties:

- 16 1. Defendant's Motion in Limine (ECF No. 68) regarding airworthiness directives.
- 17 2. Defendant's Motion in Limine (ECF No. 69) regarding product defect and failure to warn.
- 18 3. Defendant's Motion in Limine (ECF No. 70) regarding loss of income.
- 19 4. Defendant's Motion in Limine (ECF No. 71) regarding Susan Leahy's remarriage.
- 20 5. Defendant's Motion in Limine (ECF No. 72) regarding export certificate of airworthiness.
- 21 6. Defendant's Motion in Limine (ECF No. 73) requesting judicial notice.
- 22 7. Plaintiffs' Motion in Limine (ECF No. 74) regarding NTSB probable cause determination.
- 23 8. Plaintiffs' Motion in Limine (ECF No. 75) regarding life insurance and other settlements.
- 24 9. Plaintiffs' Motion in Limine (ECF No. 76) regarding other litigation and claims.
- 25 10. Plaintiffs' Motion in Limine (ECF No. 77) regarding Susan Leahy's remarriage.
11. Plaintiffs' Motion in Limine (ECF No. 78) regarding Defendant's expert Jim Johnson.

I. BACKGROUND

On August 28, 2008, William John Leahy, Jr. was piloting a twin-engine Piper PA-31-350 Navajo Chieftain aircraft from Las Vegas, Nevada, to Palo Alto, California, when it apparently lost power, caught on fire, and crashed shortly after takeoff, resulting in his death. Plaintiffs filed suit in this Court alleging: (1) Negligence Causing Wrongful Death; and (2) Strict Liability for Product Defect and Failure to Warn. (Compl., ECF No. 1.)¹ In its Answer, Defendant Lone Mountain Aviation admitted that it is an aircraft maintenance facility that performed services on the subject aircraft prior to the crash. (ECF No. 15.) Specifically, Lone Mountain changed the oil and filter on the left engine on July 28, 2008, and issued an Export Certificate of Acceptance on August 15, 2008, for export of the plane to South Korea. (Def.'s MIL-MSJ, 3:12-15, ECF Nos. 51, 52.)

II. DISCUSSION

In general, "[t]he court must decide any preliminary question about whether . . . evidence is admissible." Fed. R. Evid. 104(a). In order to satisfy the burden of proof for Rule 104(a), a party must show that the requirements for admissibility are met by a preponderance of the evidence. *See Bourjaily v. United States*, 483 U.S. 171, 175 (1987) ("We have traditionally required that these matters [regarding admissibility determinations that hinge on preliminary factual questions] be established by a preponderance of proof.").

"Irrelevant evidence is not admissible." Fed. R. Evid. 402. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence;

¹ Plaintiffs also filed suit in the United States District Court for the Southern District of Ohio, *Leahy v. Signature Engines, Inc.*, No. 1:10-cv-00070-SSB-KLL, against Signature Engines, Inc., O&N Aircraft Modifications, Inc., and Avionics, Inc. (Notice of Related Case, ECF No. 64.) The Ohio case was dismissed with prejudice in October 2012, upon notification to the court that the action was settled. Order, Oct. 25, 2012, *Leahy v. Signature Engines, Inc.*, No. 1:10-cv-00070-SSB-KLL (S.D. Ohio Oct. 25, 2012), ECF No. 108.

1 and (b) the fact is of consequence in determining the action.” Fed. R. Evid. 401. “The court
2 may exclude relevant evidence if its probative value is substantially outweighed by a danger of
3 one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue
4 delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403.

5 “Although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings,
6 the practice has developed pursuant to the district court’s inherent authority to manage the
7 course of trials.” *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984) (citing Federal Rule of
8 Evidence 103(c)). *In limine* rulings “are not binding on the trial judge, and the judge may
9 always change his mind during the course of a trial.” *Ohler v. United States*, 529 U.S. 753, 758
10 n.3 (2000); *accord Luce*, 469 U.S. at 41 (noting that *in limine* rulings are always subject to
11 change, especially if the evidence unfolds in an unanticipated manner).

12 A. Defendant’s Motion in Limine re: Airworthiness Directives (ECF No. 68)

13 In its first motion in limine, Defendant requests that the Court “preclude admission of
14 Plaintiffs’ proposed trial exhibits 56, 59, 117, and 118 dealing with Airworthiness Directives
15 and Proposed Airworthiness Directives.” (MIL re: Airworthiness, 1:20-21, ECF No. 68.)
16 Defendant relies on Rules 104, 401, and 403 of the Federal Rules of Evidence to argue that
17 these exhibits are not relevant and not admissible. (*Id.*) Defendant argues that the exhibits
18 “deal with a coupling between the turbo-charger itself and the turbo-charger exhaust pipe.” (*Id.*
19 at 2:16-17.) Defendant claims that “Plaintiffs allege that the cause of the crash was an eroded
20 and damaged left engine exhaust pipe,” which “is located substantially down stream from the
21 coupling between the turbo-charger and the exhaust pipe,” and that therefore “anything
22 contained in the proposed trial exhibits would not be relevant to the case at hand.” (*Id.* at 2:17-
23 21.) Also, Defendant argues that “proposed trial exhibit 59 is a Proposed Airworthiness
24 Directive which is dated February 19, 2010,” which “is subsequent to the accident and thus
25 clearly not admissible pursuant to FRE 407.” (*Id.* at 2:22-24.)

1 Plaintiffs oppose the motion by first explaining the exhibits:

2 Federal Aviation Regulations Part 39, Airworthiness Directives, defines the
3 authority and responsibility of the Administrator for requiring the necessary
4 corrective action. Airworthiness Directives (“ADs”) are the media used to notify
5 aircraft owners and fixed based maintenance operators such as LMA of unsafe
conditions and to specify the conditions under which the product should be
inspected and repaired so that it may continue to be operated.

6 (Pls.’ Resp. to MIL re: Airworthiness, 2, ECF No. 80.) Plaintiffs add that “[i]n this case,
7 plaintiffs have listed four ADs as evidence that plaintiffs’ primary liability expert witness,
8 Douglas Stimpson, intends to utilize with regard to the presentation of his testimony and
9 evidence in this case.” (*Id.* at 3.) Plaintiffs oppose Defendant’s arguments by pointing out that
10 evidence produced at trial, specifically the testimony of Douglas Stimpson, will demonstrate
11 the appropriate foundation for the admissibility of these exhibits, and that therefore Defendant’s
12 motion is without basis. The Court agrees, and will deny Defendant’s motion in limine (ECF
13 No. 68). Plaintiffs may offer evidence regarding relevance and to establish a foundation for
14 these exhibits at trial, and Defendant may object at that time.

15 B. Defendant’s Motion in Limine re: Product Defect (ECF No. 69)

16 In its second motion in limine, Defendant requests that the Court preclude any evidence
17 relating to Plaintiffs’ second cause of action regarding strict product liability and failure to
18 warn. (MIL re: Product Defect, 1:20-21, ECF No. 69.) Defendant relies on Rules 104, 401, 402
19 and 403 to argue that any evidence Plaintiffs may provide for their second cause of action is
20 irrelevant and inadmissible. (*Id.* at 2:2-3.) In the Complaint, Plaintiffs allege that Defendant
21 “so designed, manufactured, remanufactured, overhauled, modified, altered, repaired, sold or
22 provided instructions or warning for the components, assemblies or systems of the above
23 aircraft so that . . . as a result of said defects,” the aircraft piloted by the decedent “lost power,
24 caught fire, and lost control, causing it to crash and proximately causing [his death].” (Compl.,
25 5:¶15, ECF No. 1.)

1 Plaintiffs oppose the motion with citations to case law, and provide exhibits to support
2 their argument that evidence for their second cause of action is not inadmissible. Here, as with
3 the motion discussed above, the Court finds that Defendant has not met its burden to show that
4 a blanket evidentiary ruling is appropriate as to any and all evidence Plaintiffs may provide as
5 to their second cause of action. Accordingly, the Court will deny the motion.²

6 C. Defendant's Motion in Limine re: Loss of Income (ECF No. 70)

7 In the third motion in limine, Defendant requests "a determination from the Court
8 regarding the lack of evidence to support Plaintiffs' loss of income claim" and argues that
9 "Plaintiffs should be precluded from making any reference to or attempting to testify about any
10 loss of income claim." (MIL re: Loss of Income, 2:2-4, 5:16-17, ECF No. 70.) Defendant
11 argues that "Plaintiffs have no evidence to establish what income Mr. Leahy was generating
12 prior to his death," as shown by Susan Leahy's statements during a deposition for the Ohio
13 litigation that she did not have possession of his tax returns, and that "any evidence which
14 Plaintiffs' [sic] may try to elicit on this loss of income claim would be purely speculative." (*Id.*
15 at 5:5-9.)

16 In opposition, Plaintiffs point out the context and circumstances of Susan Leahy's
17 statements, and argue that "the fact that there are no profit and loss statements or balance sheets
18 relating to his work prior to his death does not mean that the plaintiffs cannot present a claim
19 for economic loss to a jury." (Resp. to MIL re: Loss of Income, 2, ECF No. 83.) Plaintiffs
20 argue that an evidentiary foundation for this claim can be provided without tax returns or
21 statements relating to profit and loss of a financial enterprise. (*Id.* at 3.) Specifically, citing

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23 ² The Court notes that the dispositive motion deadline has expired, and Defendant did not move for
24 summary judgment as to either of Plaintiffs' causes of action. To the extent that Defendant's intent was
25 move for judgment pursuant to Rule 50(a) of the Federal Rules of Civil Procedure, the appropriate
procedure is described in that rule.

1 Rule 602 of the Federal Rules of Evidence and its commentary, Plaintiffs argue that their
2 witnesses, including Susan Leahy, have sufficient knowledge to provide supporting evidence
3 for this claim. (*Id.*) The Court agrees with Plaintiffs that “[t]he lack of tax returns or other
4 specific financial documentation should not deprive the plaintiff the opportunity to first lay a
5 foundation with regard to loss of economic support in a wrongful death matter,” (*id.* at 4) and
6 will accordingly deny the motion.

7 D. The parties’ Motions in Limine re: Susan Leahy’s Remarriage (ECF Nos. 71, 77)

8 Both Plaintiffs and Defendant submitted motions in limine regarding the admissibility of
9 evidence that Susan Leahy remarried. Defendant argues that it should be allowed to argue that
10 Susan Leahy’s remarriage limits the damages she is entitled to for “loss of service and support”
11 and for “loss of care, comfort and society” after her husband’s death. Defendant bases its
12 argument on the language of section 41.085(4) of Nevada Revised Statutes, which provides:

13 The heirs may prove their respective damages in the action . . . and the court or
14 jury may award each person pecuniary damages for the person’s grief or sorrow,
15 loss of probable support, companionship, society, comfort and consortium, and
damages for pain, suffering or disfigurement of the decedent.

16 Nev. Rev. Stat. § 41.085(4).

17 Defendant appears to concede that there is no authority for its arguments in Nevada law,
18 but instead cites to state law in other jurisdictions as persuasive authority to support its
19 arguments that this evidence is admissible and not unfairly prejudicial or likely to confuse the
20 issues pursuant to Rule 403 of the Federal Rules of Evidence.

21 Plaintiffs oppose this argument with their own motion to preclude such evidence,
22 pointing out that jurisdictions that permit such evidence are the minority view, and arguing that
23 the Court should adopt the majority view with regard to Nevada standards. Plaintiffs argue that
24 “[t]he only reason [Defendant] would want to reference such a fact is with the hope of
25 stimulating a jury to award less damages for economic losses to plaintiff and her children,” in
violation of Rule 403. (Resp. to MIL re: Susan Leahy’s Remarriage, 2, ECF No. 77.)

1 The Court agrees with Plaintiffs that Rule 403 of the Federal Rules of Evidence supports
2 exclusion of any evidence relating to Plaintiff Susan Leahy's remarriage, even if relevant,
3 because any probative value is outweighed by the danger of unfair prejudice and confusion of
4 the issues. Accordingly, the Court will grant Plaintiffs' motion in limine (ECF No. 77), and
5 will deny Defendant's motion in limine (ECF No. 71).

6 E. Defendant's Motion in Limine re: Certificate of Airworthiness (ECF No. 72)

7 Defendant's fifth motion in limine requests that the Court exclude evidence related to its
8 issuance of the export certificate of airworthiness on August 14, 2008. (ECF No. 72.)
9 Specifically, Defendant requests "to exclude evidence of Kenny Scherado's signature signing
10 off on Fred Sorenson's Annual Inspection because (1) the evidence has no probative value of
11 Lone Mountain's negligence, (2) any such claim of negligence (only regarding the export
12 certificate) is preempted by FAA regulation, and (3) the evidence creates an impermissibly high
13 likelihood of confusion." (*Id.* at 1:20-24.) Defendant argues that admission of this evidence
14 would "foster false impressions," that "the aircraft remained with Lone Mountain Aviation until
15 August 14" and that "issuance of an Export Certificate of Airworthiness required something
16 other than review of paperwork submitted by other parties." (*Id.*) Defendant cites to *Martin v.*
17 *Midwest Exp. Holdings*, 555 F.3d 806, 811 (9th Cir. 2009) and FAA regulations to support the
18 proposition that Plaintiffs' tort claims are preempted because the FAA has "pervasively
19 regulated the process for airplane exportation." (*Id.* at 5-6.)

20 In opposition, Plaintiffs argue that evidence and exhibits they intend to present at trial
21 show Defendant's negligent acts "before the issue of the Export Certificate of Airworthiness
22 came up." (*Id.* at 4.) Plaintiffs argue further that Defendant misrepresents the holding in *Martin*
23 and "conflates field preemption with complete preemption." (Resp. to MIL re: Certificate of
24 Airworthiness, 9, ECF No. 82 (citing *Montalvo v. Spirit Airlines*, 508 F.3d 464, 475-476 (9th
25 Cir. 2007).) The Court agrees, and will deny the motion to the extent that Defendant relies on

1 its preemption argument. The Court finds further that Defendant has not met its burden to
2 show that this evidence is not relevant, or that it is likely to confuse the issues, and accordingly
3 will not exclude the evidence pursuant to Rules 401 through 403 at this time. Accordingly, the
4 motion will be denied.

5 F. Defendant's Motion in Limine re: Plaintiffs' Trial Brief in Ohio case (ECF No. 73)

6 Defendant's final motion in limine requests that the Court take judicial notice pursuant
7 to Rule 201 of the Federal Rules of Evidence, recognizing a trial brief filed by Plaintiffs in the
8 Ohio litigation. (ECF No. 73.)

9 Rule 201 provides that "[t]he court may judicially notice a fact that is not subject to
10 reasonable dispute because it: (1) is generally known within the trial court's territorial
11 jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy
12 cannot reasonably be questioned." Fed. R. Evid. 201(b). "In a civil case, the court must instruct
13 the jury to accept the noticed fact as conclusive." Fed. R. Evid. 201(f).

14 Defendant argues that it is not requesting that the Court take judicial notice of the truth
15 of any findings from the previous litigation, only that the brief was filed. (MIL re: Plaintiffs'
16 Trial Brief in Ohio case, 5:9-12, ECF No. 73.) Plaintiffs reiterate the impropriety of admitting
17 the trial brief to show the truth of the statements it contains, and oppose the request by pointing
18 out that any evidence Defendant wishes to present at trial is not properly submitted through
19 judicial notice of their trial brief in the Ohio litigation. (Resp. to MIL re: Plaintiffs' Trial Brief
20 in Ohio case, 3, ECF No. 85.)

21 Here, the Court finds that although it may take judicial notice of the fact that Plaintiffs
22 filed a trial brief in the Ohio litigation, but recognizes that judicial notice and admission of the
23 brief itself is not necessarily proper, and may confuse the issues and mislead the jury, as
24 prohibited by Rule 403 of the Federal Rules of Evidence. Accordingly, the Court will deny the
25 motion so that if Defendant's wish to admit the trial brief to the jury, the Court may hear further

1 arguments at the appropriate time.

2 G. Plaintiffs' unopposed Motions in Limine (ECF Nos. 74-76)

3 Defendant has indicated that it does not oppose Plaintiffs' motions in limine, numbers
4 one through three (ECF Nos. 74-76). (Resp. to MIL, ECF Nos. 86-88.) Accordingly, the Court
5 will grant these motions in limine as unopposed.

6 H. Plaintiffs' Motion in Limine re: Defendant's Expert Jim Johnson (ECF No. 78)

7 Plaintiffs' fifth motion in limine requests an order "prohibiting Defendant Lone
8 Mountain Aviation, Inc. from utilizing Jim Johnson as an expert witness in this action." (MIL
9 re: Def.'s Expert Jim Johnson, 2, ECF No. 78.) In the response, Defendant states that it "does
10 not objection to Motion in Limine No. 5 insofar it [sic] applies to any expert testimony or
11 opinions by Jim Johnson." (Resp. to MIL re: Def.'s Expert Jim Johnson, 2:1-2, ECF No. 90.)
12 Accordingly, the Court will grant this motion in limine as unopposed.³

13 III. CONCLUSION

14 **IT IS HEREBY ORDERED** that Motion in Limine (ECF No. 68) is **DENIED**.

15 **IT IS FURTHER ORDERED** that Motion in Limine (ECF No. 69) is **DENIED**.

16 **IT IS FURTHER ORDERED** that Motion in Limine (ECF No. 70) is **DENIED**.

17 **IT IS FURTHER ORDERED** that Motion in Limine (ECF No. 71) is **DENIED**.

18 **IT IS FURTHER ORDERED** that Motion in Limine (ECF No. 72) is **DENIED**.

19 **IT IS FURTHER ORDERED** that Motion in Limine (ECF No. 73) is **DENIED**.

20 **IT IS FURTHER ORDERED** that Motion in Limine (ECF No. 74) is **GRANTED** as

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23 ³ Defendant adds that it "reserves the right to call Mr. Johnson, if necessary, to testify as to his
24 observations and the conduct of the inspection of various aircraft components," which "will not include
25 any expert opinions, just observations and first hand [sic] knowledge obtained by Mr. Johnson." (Resp.
to MIL re: Def.'s Expert Jim Johnson, 2:2-5, ECF No. 90.) To the extent that Plaintiffs wish to object
to this evidence or testimony, the Court recognizes that Plaintiffs may do so at trial.

1 unopposed.

2 **IT IS FURTHER ORDERED** that Motion in Limine (ECF No. 75) is **GRANTED** as
3 unopposed.

4 **IT IS FURTHER ORDERED** that Motion in Limine (ECF No. 76) is **GRANTED** as
5 unopposed.

6 **IT IS FURTHER ORDERED** that Motion in Limine (ECF No. 77) is **GRANTED**.

7 **IT IS FURTHER ORDERED** that Motion in Limine (ECF No. 78) is **GRANTED** as
8 unopposed.

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11 **DATED** this 29th day of April, 2013.

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15 Gloria M. Navarro
16 United States District Judge
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